



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE



IN REPLY REFER TO:  
FWS-2019-00597

1 Wildlife Drive  
Sanibel, Florida 33957

August 20, 2019

Jimmy Tobias  
MuckRock News  
DEPT MR 70980  
411A Highland Ave  
Somerville, Massachusetts 02144-2516

Dear Mr. Tobias:

This completes our response to your Freedom of Information Act (FOIA), 5 U.S.C. § 552, request, dated March 26, 2019. In your request, you asked for:

- *All records relating to any change, by instruction, guidance, memoranda, or otherwise, to policy, practice, or procedure governing the decision(s) to list, decline to list, de-list, or down-list any species or category of species or to defer or accelerate any such decision;*
- *All records relating to any change in the standards, criteria, or review process applicable to decision(s) to list, decline to list, de-list, or down-list any species or category of species, or to defer or accelerate any such decision;*
- *All records relating to any existing or proposed quotas, targets, goals, requirements, expectations, or aspirations for listing, declining to list, de-listing, or down-listing species, whether quantitative or qualitative in nature;*
- *All records relating to the selection of the 35 species identified in 83 Fed. Reg. 20092 or the 42 species identified in 83 Fed. Reg. 38320 for status reviews;*
- *All requests or instructions that staff identify listed species that could potentially be delisted or down-listed or candidate species for which listing could potentially be declined, and any records created in response to such requests or instruction; and*
- *Any and all listing petitions, de-listing petitions, status reviews, or other documents initiating a proposal to list, de-list, or down-list any species, that were forwarded to or reviewed by any of the following person(s), along with any associated responses, instructions, or annotations from the person(s) to whom they were forwarded or by whom they were reviewed:*
  - *Any person other than an employee of the Service in Region 4 or one of its field offices;*
  - *Any person who is an employee of the Service in Region 4 or one of its field offices and:*
    - *Has, at any time since January 20, 2017, been a political appointee (including without limitation any government employee that was appointed by the President, any government employee that was appointed by the Secretary or Administrator of a federal agency, any government employee that has held a Schedule C position, or any employee who has worked in the Executive Office of the President);*
    - *Has, at any time since January 20, 2017, held a position listed in any version of the document "United States Government Policy and Supporting Positions," otherwise known as the "Plum Book," whether or not the person's actual name appears in a version of the Plum Book;*
    - *Whose hiring was coordinated with the Presidential Personnel Office; or*

- *Who, as a part of their job responsibilities with the Service, communicates with elected officials or their offices*

### **Response**

We provided partial responses to you on July 30, 2019 and August 15, 2019. The Southeast Region Ecological Services Program has searched its records and has located the remaining two hundred fifty (250) documents that are responsive to your request. After consulting with the Office of the Regional Solicitor, it has been determined that some of the documents you are seeking are exempt from disclosure pursuant to Exemption 5, 5 U.S.C. § 552(5), of the FOIA. The information redacted pursuant to Exemption 5 includes privileged information involving discussions on matters of policy between subordinates and superiors and were used to guide the Agency in the decision making process; and commercial privilege information including conference call numbers. We are releasing two hundred forty-five (245) documents in full and five (5) documents (69 pages) in part.

#### Exemption 5

Exemption 5 of the FOIA allows an agency to withhold “inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Agency.” 5 U.S.C. § 552(b)(5). Exemption 5, therefore, incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges.

#### Deliberative Process Privilege

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the decision maker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both pre-decisional and deliberative. The privilege covers records that reflect the “give-and-take of the consultative process” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both pre-decisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties, and public dissemination of this information would have a chilling effect on the agency’s deliberative processes.

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

#### Commercial Information Privilege

When the government enters the marketplace as an ordinary commercial buyer or seller, the government’s information is protected under the commercial information privilege if it is sensitive information not otherwise available, and disclosure would significantly harm the government’s monetary functions or commercial interests. The theory behind the privilege is that the government may be placed at a competitive disadvantage or lose the benefit of its bargain if such information were disclosed to the public.

The conference telephone numbers and passcodes in this case pertain to the Service's ongoing operations in the area that is the subject of your request. The information withheld under this privilege reflects information concerning the operations of the government which could be harmed if disclosed. Therefore, we conclude that disclosure of conference telephone numbers and passcodes could place the government at a competitive disadvantage. We are releasing the factual information in the responsive document that would not harm the Service's commercial interests.

We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure.

In addition to me, the official responsible for this denial is:

Brigette J. Beaton, Attorney-Advisor  
Office of the Regional Solicitor  
U.S. Department of the Interior  
75 Ted Turner Drive, S.W., Suite 304  
Atlanta, Georgia 30303

### **Conclusion**

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions, please contact me by phone at (404) 679-4104 or by email at [foiar4@fws.gov](mailto:foiar4@fws.gov). Thank you for contacting the U.S. Fish and Wildlife Service.

Sincerely,

8/20/2019

**X** Tiffany McClurkin

Tiffany McClurkin  
Region 4 FOIA Coordinator  
Signed by: TIFFANY MCCLURKIN

Enclosure